

# Common Privilege Issues in Internal and Government Investigations

J. Nicholas Bunch  
Haynes Boone LLP  
May 9, 2024  
Houston, Texas

1

1

## Five Scenarios

- Disclosures to the Board of Directors
- Disclosures between and among Represented Employees
- Disclosures to Insurers
- Disclosures to the Government (voluntary & compelled)
- What to do when the government seizes privileged records

2

2

## Scenario No. 1 – Disclosures to the Board

You hire outside counsel to investigate a whistleblower complaint concerning alleged false representations in the company's SEC filings. Outside counsel completes its investigation and is asked to brief the Board of Directors.

3

3

## Attorney-Client Privilege: The Basics

Communication

Made between  
Attorney and Client

Kept in  
Confidence

For obtaining or  
providing legal  
advice

4

4

# Attorney-Client Privilege: Who's Protected?

- Communication between “attorney” and “client”
  - In-house counsel often wears multiple hats
  - Must be careful about which hat you are wearing
- Information provided by employees typically protected if:
  - Communication made to counsel acting as counsel
  - At direction of management for the purpose of securing legal advice
  - Concerning subject within the scope of employment
  - Employee knows purpose of the communication is for corporation to procure legal advice

5

5

# Attorney-Client Privilege: What's Protected?

- Legal advice and communications that will facilitate provision of legal advice
- What about mixed communications?
  - Supreme Court left open a circuit split on communications that include both legal and non-legal advice (In re Grand Jury, 2023)
    - Most circuit courts use the “primary purpose” test
    - D.C. Circuit uses the “significant purpose” test
  - Try to avoid these types of communications – separate out the privileged material where possible

6

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Common Privilege Issues in Internal Government Investigations

First appeared as part of the conference materials for the  
46<sup>th</sup> Annual Corporate Counsel Institute session

"Did You Just Waive Privilege? Protecting Privilege and Attorney Work Product"